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No. _____

In The
Supreme Court of the United States
October Term, 1987

MARY ELIZABETH BEATTIE AND CATHERINE ANNE BEATTIE, BY AND THROUGH THEIR NEXT FRIEND, J. PATRICK BEATTIE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David G. Shaftel
Suite 700
425 G Street
Anchorage, AK 99501
(907) 276-6015
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether the permanent fund dividend payments distributed by the State of Alaska to residents of the State are excludable from gross income as gifts, under I.R.C. § 102.

II. Whether the determination of the dominant reason for making the transfer is a question of fact which should be decided by the trier of fact, rather than pursuant to summary judgment procedure.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Mary Elizabeth Beattie and Catherine N. Beattie, hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which held that the permanent fund dividend payments distributed by the State of Alaska to residents of the State are not excludable from gross income as gifts, under I.R.C. § 102.

OPINION AND ORDER BELOW

The United States Court Of Appeals for the Ninth Circuit filed its Opinion on November 5, 1987. The Opinion has not yet been published. The Ninth Circuit review was from an Order for Summary Judgment, dated March 13, 1986, entered by the United States District Court for the District of Alaska. Copies of the above-referenced opinion and order are included in the Appendix accompanying this Petition.

JURISDICTION

The judgment sought to be reviewed was filed on November 5, 1987, by the United States Court of Appeals

For The Ninth Circuit. The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1254(1).

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STATUTES WHICH THE CASE INVOLVES

Internal Revenue Code of 1954:

Sec. 102: Gifts and Inheritances.

(a) General rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

Chapter 21, Session Laws of Alaska (1980):

Section 1. POLICY, PURPOSES AND FINDINGS. (a) It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state.

(b) The purposes of this Act are:

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

(c) The legislature finds that the accrual of permanent fund dividends provided in AS 43.23 enacted in sec. 2 of this Act, based on full years of residency since January 1, 1959, fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood. It is in the public interest to distribute a portion of Alaska's energy wealth to the people of the state.

(d) The legislature also finds that state residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's income from oil, gas, and other mineral production to help offset rising fuel costs.

(e) The legislature also finds that there exists in the state a serious problem of population turnover. A substantial portion of the state's population is comprised of individuals who reside in Alaska for only a relatively short time. This constant turnover in population leads to political, economic, and social instability and is harmful to the state. It is in the public interest for the state to promote a stable resident population by providing an incentive to encourage Alaskans to maintain their residency in the state.

STATEMENT OF THE CASE

After the discovery and development of oil on Alaska's North Slope, the State of Alaska received large surplus revenues, far in excess of amounts needed for ordinary governmental functions. In response, in 1976 the State established the Permanent Fund, into which the State made a constitutional dedication of at least 25 percent of all oil and mineral revenues and royalties. (Alaska Const., Art. 9, § 15).

As this fund grew, the Alaska Legislature was faced with public demands that some of the wealth be returned to the citizenry through tax repeal and cash distributions. (*See generally* Groh and Erickson, "The Permanent Fund Dividend Program," Alaska Journal (Summer 1983).) The Legislature responded with a statute which became law on April 15, 1980 wherein the State provided a means to give away annually one-half of the earnings of that fund to its citizenry. (Alaska Session Laws 1980, Chap. 21.)

The statements of Alaska legislators, in the legislative history of the above Act, established that most legislators viewed the "dominant reason" for the permanent fund distributions as the distribution of excess oil wealth to the people of the State of Alaska. (CR 22, Exh. 3, pp. 6, 8 and 9, Exh. 10, p. 4.) Such a distribution to the people, who would then decide how the funds would be spent, was philosophically attractive to legislators. (*Id.*) The purposes of the Act were stated in the preamble. Again, the first purpose and the finding in support of it underscore the legislature's dominant reason of distributing excess oil wealth to the residents of the State.

Under the 1980 legislation, the amount which any Alaska resident received was tied to the duration of his or her residency in Alaska. This 1980 legislation was challenged as violating the rights of interstate travel and equal protection. Upon appeal, after the Alaska Supreme Court upheld the legislation, the Supreme Court of the United States held that the 1980 Act violated the guarantees of the Equal Protection Clause of the 14th Amendment. (*Zobel v. Williams*, 457 U.S. 55, 72 L.Ed.2d 627, 102 S.Ct. 2309 (1982).)

During the above-described litigation challenging the 1980 legislation, the Alaska Legislature became impatient with the fact that no distributions had taken place. The legislature enacted so-called "backstop" legislation, which was intended to trigger a distribution of funds upon the Supreme Court's decision. The "backstop" legislation, which ultimately became law, directed that permanent fund amounts be distributed to all residents who had lived in Alaska for at least six months at the time of their application.

Former Commissioner of Revenue, Thomas K. Williams, in his deposition, testified that all a person needed to do to obtain a dividend was to file an application which established that the person satisfied the six-months residency requirement. No attempt was made to find out whether the individual applicant did anything positive for the State in return for the dividend. Whether the person was a productive member of the State was irrelevant. An applicant was never required to enter into any kind of agreement with the State of Alaska that the applicant would remain in the State or would become a watchdog

of the investments of the permanent fund. (Williams dep. at 61, 76-80.)

On May 3, 1985, Mary Elizabeth Beattie, a minor then five years old, filed suit for refund of income taxes paid with respect to the $1,000.00 and $386.00 permanent fund distributions which she had received for 1982 and 1983. On July 23, 1985, her sister, Catherine Anne Beattie, filed a similar suit, as a class action. A request has not yet been made for certification of the class. After the first Beattie case was filed, David J. Greisen filed a refund suit, which has been heard along with the Beattie cases, in the courts below. Jurisdiction was conferred upon the federal district court by virtue of 28 U.S.C. § 1346(a)(1). On March 14, 1986, the United States District Court for the District of Alaska granted summary judgment in favor of the government and against the above-listed three taxpayers. In an opinion filed on November 5, 1987, the United States Court of Appeals for the Ninth Circuit affirmed the lower court's order.

During 1982, the State of Alaska paid total permanent fund dividends of approximately $330,000,000. It has been estimated that the federal income tax collected on such dividends was approximately 20 percent, or approximately $66,000,000. This trend has continued through the present date. Therefore, very large amounts of funds have been diverted from the Alaska economy into the federal tax coffers.

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REASONS FOR GRANTING THE WRIT

I. The Duberstein standard is inappropriate for a legal entity transferor, such as a government.

Analysis of the excludability of the Alaska permanent fund distributions under I.R.C. § 102 is hindered by the inappropriateness of the *Duberstein* standard in this type of fact situation. That standard, framed in terms of emotions such as affection and admiration, is not helpful when analyzing a transfer by a government transferor, or indeed, a transfer by any legal entity.

The *Duberstein* standard needs to be supplemented by a more rationally applicable standard for this type of fact situation. An example of such a standard is the *quid pro quo* test, developed by the Court of Claims. This test focuses on what the transferor received in return, and if such consideration was substantial, then this test concludes that a gift did not occur. Application of both the *Duberstein* and the *quid pro quo* tests is discussed in Section III, below, and both of these tests establish that the Alaska permanent fund dividend distributions are gifts under I.R.C. § 102.

II. Taxability of Alaska permanent fund distributions affects every Alaska resident.

The Internal Revenue Service's aggressive position that the Alaska permanent fund distributions are taxable has diverted a huge amount of funds from the residents of Alaska to the federal tax accounts. This posture has affected every Alaska resident. The funds are badly needed in a state suffering severely from economic recession.

III. The permanent fund dividend payments distributed by the State of Alaska to residents of the State are excludable from gross income as gifts, under I.R.C. § 102.

A. The Duberstein Standard Establishes That The Permanent Fund Distributions Are Gifts Under I.R.C. § 102.

I.R.C. § 102(a) states, in part: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance." Both the Internal Revenue Service and the courts have established that a government entity may make a gift under I.R.C. § 102. (Rev. Rul. 55-609, 1955-2 C.B. 34; Rev. Rul. 57-233, 1957-1 C.B. 60; *Dewling v. U.S.*, 101 F. Supp. 892 (Ct. cl. 1952); *United States v. Hurst*, 2 F.2d 73 (Dist. Wyo., 1924).)

The United States Supreme Court considered the definition of a gift under I.R.C. § 102 in the 1960 case of *Commissioner v. Duberstein*, 363 U.S. 278, 4 L. Ed. 2d 1218, 80 Sup. Ct. 1190. In making its decision, the Supreme Court defined a "gift" under I.R.C. § 102, as follows:

> And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus v. Commissioner*, 302 U.S. 34, 41, 82 L.Ed. 32, 37, 58 Sup. Ct. 61, it is not a gift. And conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson v. United States*, 343 U.S. 71, 714, 96 L.Ed. 1237, 1240, 72 Sup. Ct. 994. A gift in the statutory sense, on the other hand, proceeds from a "*detached and disinterested generosity*," *Commissioner v. Lo Bue*, 351 U.S. 243, 246, 100 L.Ed. 1142, 1147, 76 Sup. Ct. 800; "*out of affection, respect, admiration, charity or like impulses.*" *Robertson v. United States*,

> supra (343 U.S. at 714). And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." *Bogardus v. Commissioner,* 302 U.S. 34, 43, 82 L.Ed. 32, 38, 58 Sup. Ct. 61. "*What controls is the intention* with which payment, however voluntary, has been made." (363 U.S. 278, 285.)
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> * * *
>
> We take it that the proper criterion, established by decision here, is one that inquires *what the basic reason for his conduct was in fact*—the *dominent reason* that *explains his action in making the transfer.* Further than that we do not think it profitable to go. (363 U.S. 278, 286). [Emphasis added.]

The first purpose stated by the Alaska Legislature in the 1980 Act was the equitable distribution to the people of Alaska of a portion of the State's equitable wealth, which belonged to them as Alaskans. Most legislators viewed the "dominant reason" for the payments as the distribution of excess oil wealth to the people of the State of Alaska. Therefore, pursuant to the *Duberstein* standard, this is the intention that should be analyzed when determining if the payments are "gifts" under I.R.C. § 102.

Focusing upon the standards stated in *Duberstein, supra,* there was no moral or legal duty requiring the State of Alaska to make the permanent fund distributions. Nor did the State have the incentive of anticipated benefit of an economic nature. Nor were the payments transferred in return for services rendered. From a positive standpoint, the State's distribution of excess natural resource wealth to its residents, wealth which is "belonging to them as

Alaskans," is a transfer which could be described as proceeding from "detached and disinterested generosity . . . out of affection, respect, admiration, charity *or like impulses.*" Therefore, applying the general standards of *Duberstein, supra,* the State of Alaska's permanent fund payments to its residents qualify as gifts under I.R.C. § 102.

B. The "Detached And Disinterested Generosity" Standard (Duberstein) Is Inappropriate For Analysis Of A Government Transfer. The Quid Pro Quo Standard Provides A More Helpful Test For Determining If A Transfer Is A Gift.

The *Duberstein case, supra,* and the cases relied upon by the Supreme Court in devising the *Duberstein* standards, involved typical business fact situations (employer-employee, business associate-business associate). In those types of situations, transfers may well be motivated by feelings such as "affection, respect, admiration, charity or like impulses." Those emotions are inappropriate to a government transferor. However, as has been discussed above, the parties agree that a government entity may make a gift under I.R.C. § 102. Therefore, the *Duberstein* standard is inappropriate and unhelpful in the government transferor fact situation.

The Court of Claims has developed a *quid pro quo* standard for analysis of gratuitous transfers which provides a more rational analysis of the instant governmental transferor type of fact situation. This standard was developed to analyze transfers made for charitable purposes, under I.R.C. § 170. The courts have used the *Duberstein* definition of a gift under I.R.C. § 102 to define a gift under

I.R.C. § 170. (*Allen v. U.S.*, 541 F.2d 786, 787 (9th Cir., 1976).) Therefore, the reverse should be equally correct.

In *Singer Company v. United States*, 449 F.2d 413 (1971), the Singer Sewing Machine Company distributed sewing machines to two categories of recipients: schools, and to various charities. The Court of Claims held that the distributions to the non-school charities qualified as charitable gifts, and therefore were deductible. However, the distributions to the schools did not so qualify. The Court of Claims decided that a standard more specific than that provided by *Duberstein* was needed. The court pointed out that numerous other courts had relied on a more specific standard, when appropriate fact situations required it, explaining as follows:

> In most of those instances where the disinterested generosity test has not been used the cases have dealt with the question of deductibility of a transfer as a "gift" in terms of whether the transferor received, or expected to receive, something in return for that transfer. If the transfer was made with the expectation of receiving something in return as a *quid pro quo* for the transfer then in such an instance the I.R.C. section 170 deduction was denied. (449 F.2d 413, 422).

The Court of Claims concluded that a standard should be applied which directly focuses upon the specific and unusual type of relationship involved in that case. The standard is as follows:

> It is our opinion that *if the benefits received*, or expected to be received, *are substantial*, and meaning by *that, benefits greater than those that inure to the general public from transfers for charitable purposes* (which benefits are merely *incidental* to the transfer), *then* in such case we feel the *transferor has received*, or expects to receive, a *quid pro quo sufficient* to *re-*

> *move* the *transfer* from the realm of deductibility under *section 170.* (449 F.2d 413, 423.)
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> * * * * * * * * *
>
> . . . however, we do not contend that absolutely no benefits can be derived from an otherwise charitable contribution or gift. (*See Citizens & Southern National Bank of South Carolina, supra,* 243 F. Supp. at 904. *It is only when the benefits derived are substantial* enough to provide a *quid pro quo* for the transfer that the deduction is not allowed. (449 F.2d 413, 423.) [Emphasis added.]

The *quid pro quo* standard has been applied by the Ninth Circuit (*United States v. Transamerica Corporation,* 392 F.2d 522 (1968)) and by the Internal Revenue Service (paraphrasing the *quid pro quo* standard, in Rev. Rul. 80-286, 1980-2 C.B. 180, and Rev. Rul. 76-185, 1976-1 C.B. 60). In addition, the Internal Revenue Service has applied the exchange concept involved in the *quid pro quo* doctrine in Revenue Ruling 72-314, 1972-1 C.B. 44, and in Revenue Ruling 57-233, 1957-1 C.B. 60. In the latter ruling, the Internal Revenue Service held that payments from the federal government to groups of American Indians, for relocation and vocational training, were gifts under I.R.C. § 102. The Internal Revenue Service stressed that "The Government receives no consideration for such grants and the Indians incur no obligations other than to carry out the relocation and vocational training plans. . . ." (1957-1 C.B. 60, 61.)

Application of the *quid pro quo* standard to the present facts establishes that the permanent fund distributions are gifts under I.R.C. § 102. First, a distribution of excess energy wealth to the people of the State does not produce a *quid pro quo* to the State. Second, the popula-

tion stability goal was only a mere hope. (In fact, Alaska's population has declined since the program began.) The recipients do not have to agree to remain in the State of Alaska. There are no legal or moral obligations in support of such a population stability concept. Almost all government expenditures just as relevantly support such a population stability concept. The mere hope, unsupported by any legal or moral obligation, that the undiscriminated recipients of the permanent fund payments will be deterred from leaving the State because of receipt of such payments, cannot be considered a "substantial benefit." Rather, this generalized, amorphous benefit received by the State is much more accurately classified as incidental. Third, nor may the tenuous and indirect benefits of citizen interest in the management of the permanent fund be considered a substantial benefit received by the State. An interest in well run government is an incidental benefit, closely analogous to the benefits that inure to the general public from transfers for charitable purposes. Therefore, application of the *quid pro quo* standard to the instant situation again establishes that the permanent fund distributions made by the State of Alaska to its residents were gifts under I.R.C. § 102.

C. I.R.C. § 102 Expressly Excludes From Gross Income Distributions Of Excess Wealth.

I.R.C. § 102 expressly excludes from gross income not only gifts but also property acquired by ". . . bequest, devise, or inheritance." Therefore, I.R.C. § 102 is stating that a distribution which is in the nature of excess wealth, no longer needed by the donor and therefore passed on to the donee, is excludable from gross income. This is exactly the instant permanent fund dividend situation. These divi-

dends are distributions of excess energy wealth by the State of Alaska, which did not need this excess wealth, to the residents of the State. Therefore, the Alaska Permanent Fund Dividend Program is expressly covered by the statute, and these distributions are excludable from gross income.

D. The State Of Alaska Did Not Have Any Type Of "Duty" Or "Obligation" To Distribute A Portion Of The State's Energy Wealth To The Residents Of Alaska.

The United States has argued that the State of Alaska distributed the excess energy wealth because of some type of duty or obligation. This argument is a strained attempt by the Government to try to fit the instant situation within the "moral or legal duty" language of the *Duberstein* standard. (363 U.S. 278, 285.) The District Court, and subsequently the Ninth Circuit, concluded that some kind of obligation existed, but then had an extremely difficult time explaining this obligation, and failed to explain where this obligation was grounded in the record. (635 F. Supp. at 489; Ninth Circuit Slip Op., at p. 9.)

In fact, the State of Alaska had no legal, moral or other obligation to distribute a portion of the State's energy wealth to Alaska residents. Rather, it was *politically and philosophically advantageous* to make such distributions. There was a substantial amount of public pressure to return excess wealth to the public. Numerous legislators and public officials thought such a distribution was philosophically attractive.

Finally, the Government and the Ninth Circuit rely upon the introductory language of the Alaska statute in an

attempt to conclude that a duty exists. This reliance and reasoning is strained and erroneous. The statute only states that "It is the duty and policy of this state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state." (Chapter 21, Session Laws of Alaska (1980), Section 1(a).) None of these functions is relevant in any manner to the distribution of excess wealth involved in the Permanent Fund Dividend Program. In summary, the Government's and the lower courts' "duty" and "obligation" characterizations are conclusions, which are not supported by the factual history of the present case.

E. The Permanent Fund Dividend Transfer Of Funds Satisfies Both The Alaska Public Purpose Requirement And The I.R.C. § 102 Gift Standard.

The United States argues that the distributions of excess energy wealth satisfied the Alaska State Constitution's requirement that any appropriation of public money be made for a public purpose. As a result, the Government concludes that if the funds were distributed for a public purpose, they cannot be gifts under I.R.C. § 102.

The issue of whether the Permanent Fund Dividend Program satisfied the public purpose requirement of the Alaska Constitution is irrelevant to resolution of the income tax issue under I.R.C. § 102. The Alaska public purpose test is easily satisfied, and the Supreme Court of Alaska has held that a legislative determination will only be reviewed pursuant to an arbitrariness standard. (*Suber v. Alaska State Bond Comm.*, 414 P.2d 546 (Ak. 1966).)

Therefore, the standard to satisfy the minimal public purpose requirement is quite different from the *Duberstein* income tax standard under I.R.C. § 102.

F. The State Of Alaska Has Not Taken The Position That Permanent Fund Dividends Are Taxable.

The United States attempts to argue that the State of Alaska agreed that permanent fund dividends are taxable under the federal income tax. This is a disingenuous argument. The United States has conveniently overlooked key historical facts. Shortly after the permanent fund dividend legislation was proposed, the Internal Revenue Service took a very aggressive and explicit stance that the dividends were taxable. (Williams Dep. at 83; Cr 34, exhibit.) As a result, the State of Alaska asked the Internal Revenue Service for a ruling concerning this matter. The I.R.S. responded with a negative ruling, which concluded that the permanent fund dividends were taxable. As a result, the State of Alaska provided notice of the I.R.S.'s position to recipients of the permanent fund dividends. Such notices in no way indicated that the State of Alaska agreed with the I.R.S.'s position. At most, the notices establish the State's good-faith effort to pass on the position of another government entity.

IV. The District Court erroneously decided this case pursuant to summary judgment procedure.

In *Commissioner v. Duberstein*, 363 U.S. 278, 4 L. Ed. 2d 1218, 80 Sup. Ct. 1190, the Supreme Court concluded that the donor's intention is controlling as to whether a "gift" has been made. (363 U.S. 278, 285.) The Supreme Court emphasized that the determination of whether the

transfer constitutes a gift under I.R.C. § 102 is a question of fact, to be determined by the trier of fact on a case-by-case basis. (363 U.S. 278, 289-291.) It is well established that an issue of fact involving intention should not be decided by summary judgment. (*Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136 (9th Cir., 1981); Wright, Miller & Kane, "Federal Practice and Procedure" (West Pub. Co., 1983), Vol. 10A, p. 238.) Therefore, this case should have been decided by the trier of fact, after considering all of the factual evidence. This case should not have been decided pursuant to summary judgment procedure.

V. CONCLUSION

The Ninth Circuit and the District Court have forced analysis of their decisions through the use of the *Duberstein* standard. Unaided by the *Duberstein* emotion-based guidelines, such as "affection" and "admiration," the courts focused upon the "moral or legal duty" aspect of the *Duberstein* standard, and strained to find an obligation on the part of the State of Alaska, where no such obligation existed. Neither the Ninth Circuit's, nor the District Court's, factual conclusions are supported by the record.

The weakness and incorrectness of the lower courts' opinions in this case are caused by the inappropriateness of the *Duberstein* standard with respect to a factual situation involving a government transferor. The *Duberstein* concepts cannot be expanded into the present type of fact situation without forcing an almost irrational form of analysis. The *Duberstein* standard needs to be supplemented with an additional test, such as the *quid pro quo* standard.

Based upon the reasons and authorities discussed above, petitioners Mary Elizabeth Beattie and Catherine

Anne Beattie respectfully request that the Supreme Court grant certiorari, and reverse the judgment below.

RESPECTFULLY SUBMITTED, on this 23rd day of December, 1987.

/s/ David G. Shaftel
David G. Shaftel
Counsel for Appellants
Mary Elizabeth Beattie and
Catherine Anne Beattie

425 G Street, Suite 700
Anchorage, AK 99501
(907) 276-6015

No. .....

In The

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October Term, 1987

MARY ELIZABETH BEATTIE AND CATHERINE ANNE BEATTIE, BY AND THROUGH THEIR NEXT FRIEND, J. PATRICK BEATTIE,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

David G. Shaftel
Suite 700
425 G Street
Anchorage, AK 99501
(907) 276-6015
Counsel for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID J. GREISEN, by and through his father and natural guardian, RONALD T. GREISEN, *Plaintiff-Appellant,*	)	No. 86-3728
v.	)	D.C. No. A-85-209-CV
UNITED STATES OF AMERICA, *Defendant-Appellant.*	)	
MARY ELIZABETH BEATTIE and CATHERINE ANNE BEATTIE, minors, through their next friend, J. Patrick Beattie, *Plainiffs-Appellants.*	)	No. 86-3828
v.	)	D.C. No. CV-A85-209-HRH
UNITED STATES OF AMERICA, *Defendant-Appellant.*	)	OPINION

Argued and Submitted

August 4, 1987—Anchorage, Alaska

Filed November 5, 1987

Before: Alfred T. Goodwin, J. Blaine Anderson and Melvin Brunetti, Circuit Judges.

Opinion by Judge Goodwin

Appeal from the United States District Court for the District of Alaska

H. Russel Holland, District Judge, Presiding

SUMMARY

Taxation

Appeal from judgment. Affirmed.

In 1976, the people of the State of Alaska established the Alaska Permanent Fund, financed by at least 25% of the state's annual oil and mineral proceeds. In 1980, the state legislature enacted the Permanent Fund Dividend Program to distribute annually a portion of the fund's earnings to each of the state's adult residents. In 1982, the Supreme Court struck down as violative of equal protection the 1980 Act. Anticipating a possible ruling by the Supreme Court, the Alaska legislature enacted "backstop" legislation. The 1982 Act provided dividends to each eligible resident, including minors. The three appellants sued separately for refunds from the IRS for taxes allegedly erroneously and illegally collected from them.

[1] The taxpayers contend that summary judgment was inappropriate because the crucial issue of donative intent is a question of fact. [2] Here, however, the state is the transferor and the task of determining the legislative intent is creating the dividend program presents a question of law. [3] Greisen claims that at the time of the adoption of the sixteenth amendment the term "income" was commonly understood to mean a "coming in" of wealth from a source exterior to the taxpayer. He argues that Permanent Fund dividends do not come from an outside source because they derive from the state's natural resources, which already are owned by the people of the state. [4] This court rejects this conclusion that the people own the state's natural resources. [5] Further, the dividends represent interest from the Permanent Fund, which consists of a portion of all mineral lease payments made to the state. Even if the citizens of Alaska owned the principal of the fund, the interest on that principal would constitute gross income and thus would be subject

to taxation. [6] The taxpayers argue that the dividends are excludable as gifts. [7] For a transfer to be considered a gift, donative intent must be "the dominant reason that explains the decision in making the transfer." [8] This court finds that the preamble and the statement of purpose of the 1980 Act demonstrate that the legislature did not intend the dividends to be gifts.

COUNSEL

Steven T. O'Hara and David G. Shaftel, Anchorage, Alaska, for the plaintiffs-appellants.

Ernest J. Brown, Washington, D.C., for the defendant-appellee.

OPINION

GOODWIN, Circuit Judge:

These three separate claims, consolidated in the district court, challenge the assessment of federal income tax on payments from Alaska's Permanent Fund Dividend Program. Plaintiffs seek refund of taxes paid, claiming that Alaska's distribution of its energy wealth to the state's residents through the program is a "gift," exempt from federal taxation. On cross-motions for summary judgment, the district court granted the government's motion, finding that the payments were not gifts, that they were "income" within the meaning of the sixteenth amnedment and the Internal Revenue Code.

In 1976, the people of the State of Alaska amended their constitution to establish the Alaska Permanent Fund, financed by at least 25 percent of the state's annual oil and mineral proceeds. Alaska Const., Art. IX, § 15. The

goals of the fund are: (1) to conserve a portion of the revenues earned from mineral resources for all generations of Alaskans; (2) to maintain the safety of the fund's principal while maximizing total return; and (3) to maintain a savings device allowing maximum use of disposable income from the fund for purposes designated by law. Alaska Stat. § 37.13.020 (1983).

In 1980, the state legislature enacted the Permanent Fund Dividend Program to distribute annually a portion of the fund's earnings to each of thet state's adult residents. The 1980 Act was intended: (1) to provide equitable distribution of a portion of the state's energy wealth to Alaskans; (2) to encourage people to remain Alaska residents, thereby reducing population turnover in the state; and (3) to encourage awareness and interest in the management of the fund. 1980 Alaska Sess. Laws Ch. 21 § 1(b).

In 1982, the Supreme Court struck down as violative of equal protection the 1980 Act, finding that no valid state interest supported the payment of increased dividends to long-term residents. *Zobel v. Williams,* 457 U.S. 55, 65 (1982). Anticipating a possible ruling by the Supreme Court, the Alaska legislature enacted "backstop" legislation, which became operative shortly after *Zobel,* codified at Alaska Stat. §§ 43.23.005-.095 (1983). The legislature did not amend the stated purposes of the 1980 Act when it adopted the 1982 legislation.

The 1982 Act provided dividends of $1,000 to each eligible resident, including minors.[1] The three appellants

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[1]To be eligible, a person must have been a state resident for at least six consecutive months preceding the date of application for the dividend. Alaska Stat. § 43.23.005 (1983).

sued separately for refunds from the Internal Revenue Service for taxes allegedly erroneously and illegally collected from them. Mary Elizabeth Beattie, a minor, sued through her father, J. Patrick Beattie, for a refund of $44.40 plus interest, costs, and attorney's fees for taxes paid on her 1982 and 1983 dividends, totalling $1,386.15. Her sister, Catherine Anne Beattie, also a minor, sued through her father for a refund of $57.40, plus interest, costs and attorney's fees for taxes paid on the identical dividend amounts.[2]

David J. Greisen, a minor, sued through his father, Ronald E. Greisen, for the recovery of $2 taxes paid on his 1982 dividend of $1,000, plus interest, costs, and attorney's fees. Each of the three appellants filed timely refund claims with the Internal Revenue Service, all of which were denied.

We review grants of summary judgment *de novo*. *See Bloom v. General Truck Drivers*, 783 F.2d 1356, 1358 (9th Cir. 1986). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c).

[1] The taxpayers contend that summary judgment was inappropriate because the crucial issue of donative intent is a question of fact. The taxpayers cite *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960), which held that the determination of an individual's donative intent

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[2]Although Catherine Beattie also sued on behalf of a class of all similarly situated indivduals, she has not sought class certification and thus represents only herself at this time.

"must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Duberstein,* 363 U.S. at 289. *See Olk v. United States,* 536 F.2d 876, 878 (9th Cir.), *cert. denied,* 429 U.S. 920 (1976).

[2] The trial court properly distinguished *Duberstein* and *Olk* as cases where the property transfers were motivated by interpersonal relations, thus necessitating a factual inquiry into the transferor's state of mind. *Beattie v. United States,* 635 F. Supp. 481, 487 (D. Alaska 1986). By contrast, the state is the transferor in this case, and the task of determining the legislative intent in creating the dividend program presents a question of law, not of fact. *Id.* at 487-88. *See Trustees of Amalgamated Ins. Fund v. Geltman Indus.,* 784 F.2d 926, 929 (9th Cir.), *cert. denied,* 107 S.Ct. 90 (1986) (statutory interpretation is a question of *law*); *Heard v. Commissioner,* 326 F.2d 962, 965-66 (8th Cir.), *cert. denied,* 377 U.S. 978 (1964) (rejecting a taxpayer's claim that the *Duberstein* analysis demonstrated that his government-paid annuities were a gift, based on the court's examination of statutory language and legislative history). "Such statutory interpretation does not involve fact-finding. It involves legal analysis beginning with the plain language of the statute and, where appropriate, consideration of the underlying legislative history."[3] *Beattie,* 635 F.Supp. at 487.

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[3] *American Constitutional Party v. Munro,* 650 F.2d 184 (9th Cir. 1981), the sole case relied upon by Griesen for the proposition that the dominant motivation underlying a legislative transfer is a jury question, did not consider this issue and therefore provides no support for his claim. That case involved the propriety of a grant of attorneys fees.

[3] Greisen argues that the trial court erred in finding that the Alaska Permanent Fund dividends constituted income for the purposes of the sixteenth amendment, even if they fall within the definition of income set forth by I.R.C. § 61 (1982). Greisen claims that at the time of the adoption of the sixteenth amendment the term "income" was commonly understood to mean a "coming in" of wealth from a source exterior to the taxpayer. *Beattie,* 635 F. Supp. at 491. He argues that Permanent Fund dividends do not come from an outside source because they derive from the state's natural resources, which already are owned by the people of the state, as its ultimate sovereigns.

[4] Accepting arguendo Greisen's premise that the people of Alaska have ultimate sovereignty, we reject his conclusion that the people own the state's natural resources. "In adopting their constitution, the people of the State of Alaska have very clearly constituted the *state* as owner of the natural resources which give rise to the fund in question." *Beattie,* 635 F.Supp. at 491. *See* Alaska Const. Art. VIII, § 1 (proclaiming the state's policy of "encourag[ing] the settlement of *its* land and the development of *its* resources") (emphasis added); Alaska Const. Art. VIII, § 2 (stating that "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources *belonging to the State,* including land and waters, for the maximum benefit of its people") (emphasis added).

[5] In any event, Greisen is wrong in arguing that the dividends would not constitute income if the citizens owned the natural resources. The dividends represent interest from the Permanent Fund, which consists of a por-

tion of all mineral lease payments made to the state. Even if the citizens of Alaska owned the principal of the fund, the interest on that principal would constitute gross income and thus would be subject to taxation. *See* I.R.C. § 61(a)(4)(1982) (gross income includes interest). As the trial court observed, if all Alaska citizens owned equal shares of a corporation that leased out the rights to the natural resources of Alaska, they still could be taxed on any dividends paid to them by the corporation. *See* I.R.C. § 61(a)(7)(1982) (gross income includes dividends); *Beattie*, 635 F.Supp. at 492. In short, if we accept Greisen's argument that Alaska citizens own the state's natural resources, we must conclude that the dividends constitute income.

[6] Because we hold that the dividend program payments constitute income, the taxpayers may avoid tax liability here only if the payments are encompassed within one of the Internal Revenue Code's exclusions. *See* I.R.C. §§ 101-131 (1982). The taxpayers argue that the dividends are excludable as gifts.[4] *See* I.R.C. § 102(a) (1982) (excluding gifts from the gross income of donees).

[7] *Duberstein* defines a gift as a transfer resulting from a "detached and disinterested generosity . . . out of

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[4]The Beatties make the novel and unsupported argument that we should interpret § 102, which excludes from gross income property acquired by "gift, bequest, devise, or inheritance," as meaning "that a distribution which is in the nature of excess wealth, no longer needed by the donor, and therefore passed on [to] the donee, is excludable from gross income." Given the absence of any indication that Congress intended us to read the statute as we might a common law precedent, we may not adopt the Beatties' interpretation.

affection, respect, admiration, charity or like impulses." *Duberstein*, 363 U.S. at 285 (citations omitted). A transfer will not be deemed to be a gift it it results from "the constraining force of any moral or legal duty," is given "in return for services rendered," or is given from "the incentive of an anticipated [economic] benefit."[5] *Id.* (citations omitted). For a transfer to be considered a gift, donative intent must be "the dominant reason that explains [the decision] in making the transfer." *Id.* at 286.

[8] We find that the preamble and the statement of purpose of the 1980 Act demonstrate that the legislature did not intend the dividends to be gifts.[6] The preamble indicates that the dividends were given out of a sense of moral or legal duty:

> It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state.

1980 Alaska Sess. Laws Ch. 21 § 1(a).

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[5]The Beatties argue at length that the general standards provided by *Duberstein* are not satisfactory for analyzing gifts outside of the context of interpersonal relations. They invite us to adopt what they characterize as a "refinement" of *Duberstein* in the *quid pro quo* analysis of gratuitous transfers under I.R.C. § 170, involving gifts made for charitable purposes. *See Singer Co. v. United States*, 449 F.2d 413, 423 (Ct.Cl. 1971). No precedent requires us to employ the *quid pro quo* test, and we decline to make such a sweeping change in the law.

[6]The 1982 Act was adopted without a preamble or a statement of purpose. Because the 1982 Act was enacted as a result of the decision in *Zobel v. Williams*, 457 U.S. 55 (1982), that the 1980 Act was unconstitutional, we find the language of the 1980 Act to be relevant in determining the intent of the legislature that enacted the 1982 Act.

The taxpayers argue that the term "duty" applies to the use, development, and conservation of the state's natural resources but not to the disbursement of the proceeds of those resources to the citizens. However, the plain language of the preamble belies the taxpayers' attempt to parse the statute. Furthermore, the preamble is prefatory to the statutes setting forth the purposes of the dividend program, 1980 Alaska Sess. Laws Ch. 21 § 1(b), and its placement demonstrates that it is applicable to the dividend program.

The taxpayers also claim that the state had no moral or legal duty to issue the dividends, regardless of the language of the preamble. We agree with the trial court that

> [w]hether the obligation felt by the legislature did or did not exist in law or fact, or whether it was a moral obligation or some other kind of obligation, makes no difference. What is important is that the legislature clearly conveyed the notion that it felt constrained—that is, required—to make the payments. Such is not the stuff of which "gifts" are made. Rather than bespeaking a "detached and disinterested generosity," we are left with the clear understanding that the legislature saw itself transferring what was due and owing (although not in a legal sense) to the residents of the State of Alaska.

Beattie, 635 F.Supp. at 489 (citations omitted).

Because the legislature did not intend to make a gift, we may not find the dividends to be gifts. *See Duberstein,* 363 U.S. at 284-85; *Bogardus v. Commissioner,* 302 U.S. 34, 41 (1937).

We find the language of the preamble to be dispositive of the issue of donative intent. Furthermore, we also

find that the statement of purpose to the 1980 Act demonstrates that the legislature did not intend to make a gift. According to the statement of purpose, the 1980 Act was intended: (1) to allow equitable distribution of part of the state's wealth to Alaskans; (2) to encourage people to remain Alaska residents; and (3) to encourage awareness and interest in the management of the fund. 1980 Alaska Sess. Laws Ch. 21 § 1(b)(1).

The taxpayers, noting that the rationale of equitable distribution is listed first, argue that the legislature considered this purpose most important. They claim that the other two stated goals are merely secondary by-products of the desire to achieve equitable distribution and that the state would have accomplished these goals through more effective means if they had been the primary motivation.

Although the legislature may have acted in part out of "disinterested generosity," we disagree that such donative intent was the "dominant reason" for the dividend program. *See Duberstein*, 363 U.S. at 285-86. The statement of purpose demonstrates that the legislature intended the dividends to bring the state economic benefits resulting from reduced population turnover, as well as less direct benefits arising from increased public awareness of the fund.[7] We may accept the taxpayers' argument that

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[7]We reject the taxpayers' argument that this purpose, although stated in the 1980 Act, is inapplicable to the 1982 Act because the provision differentiating among recipients according to length of residence had been declared unconstitutional by *Zobel v. Williams*, 457 U.S. 55 (1982). Under the 1982 Act, individuals still have an incentive to remain in the state to collect the yearly dividends.

donative intent was dominent only if we make the impermissible assumption that the state legislature included the latter two purposes only as window dressing.[8] We find that the state legislature lacked the donative intent necessary for a transfer to be considered a gift under *Duberstein*.

The two cases and several revenue rulings relied upon by taxpayers for the proposition that disbursements to individuals by a government entity may constitute gifts were predicated upon findings that Congress had intended to make gifts. *See Dewling v. United States*, 101 F.Supp. 892, 893-94 (Ct.Cl. 1952); *United States v. Hurst*, 2 F.2d 73, 78 (10th Cir. 1924); Rev. Rul. 57-233, 1957-1 C.B. 60, 61; Rev. Rul. 55-609, 1955-2 CB 34, 35. These precedents have no relevance where, as here, the legislature did not intend to make gifts.

The district court properly held that payments received under Alaska's Permanent Fund Dividend Program are subject to federal income tax.

Affirmed.

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[8]Given the express inclusion of the latter two purposes, we are not swayed by the Beatties' argument that most Alaska legislators understood the purpose of the dividend program to be the distribution of excess oil wealth.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MARY ELIZABETH BEATTIE, a minor, through her next friend, J. PATRICK BEATTIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. A85-209 Civil

(Consolidated)

(Filed March 13, 1986)

DAVID J. GREISEN, by and through his father and natural guardian, RONALD E. GREISEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

CATHERINE ANNE BEATTIE, a minor, through her next friend, J. PATRICK BEATTIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

(Motion for Summary Judgment by United States of America Granted)

I.

FACTUAL BACKGROUND

In 1969 after Alaska received $900 million for Prudhoe Bay oil leases, Governor Keith Miller proposed an "Alaska Permanent Resources Fund" to be invested and its earnings used to fund future state budgets. The plan did not receive legislative support. Instead these funds and some $400 million in interest were used by the state in its operation and capital budgets. The "disappearance" of this fund caused a public outcry which resulted in the creation of a state savings account. The bill creating this account was vetoed by Governor Jay Hammond because it ran afoul of the Constitution of the State of Alaska which prohibits the dedication of public revenue for special purposes. Thereafter, a constitutional amendment, title IX, section 7, was passed by the voters to overcome this impediment. The Alaska Permanent Fund was established on November 2, 1976.

The goals of the Permanent Fund as outlined in AS 37.13.020 are: (1) conservation of a portion of the state's mineral resource revenues to benefit all generations of Alaskans; (2) maintenance of the safety of the principal while maximizing total return; and (3) management of the Permanent Fund as a savings device to allow maximum use of disposable income for purposes defined by law. Funding is derived from three sources: dedicated revenue, legislative appropriations, and interest earnings.

The Alaska Constitution requires that at least 25% of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and

bonuses be placed in the fund. Title IX, section 15. Subsequent legislation provided that this percentage be increased to 50% for certain types of oil and gas receipts.

The legislature has made two special appropriations to the Permanent Fund. The first was for $900 million in 1981 (ch. 35 SLA 1980) and the second was for $1.8 billion in 1982 (ch. 101 SLA 1982).

In 1980, the state legislature enacted the Permanent Fund dividend program (ch. 21 SLA 1980, hereinafter "the 1980 Act")[1] to distribute annually a portion of the Permanent Fund's earnings directly to the state's adult residents. Under the 1980 Act, each Alaska resident 18 years of age or older would receive one dividend per each year of residency since 1959, the year of statehood. The dividends would be paid yearly, starting with a value of $50 per dividend in 1979. The initial payment to long-term residents would be $1,050 each, while a new resident, having lived only one month of 1979 in Alaska, would receive $4 (1/12th of the $50 dividend for 1979).

The legislative intent of the dividend program was: (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of natural resources belonging to them as Alaskans; (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and (3) to encourage increased, long-term awareness and involvement by the residents of the state in management

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[1] Ch. 21 SLA 1980 is set forth in the appendix to this opinion.

and expenditure of the Alaska Permanent Fund. Ch. 21 SLA 1980 § 1(b).

In 1980 two relatively new residents, Ronald M. Zobel and Patricia L. Zobel, challenged the Permanent Fund dividend program (the 1980 Act) on the grounds that the dividend plan discriminated between new and old residents of the state without adequate justification. They claimed that the dividend plan violated their rights to equal protection and to migrate freely and enjoy equal rights with other citizens of the state.

The Alaska Supreme Court, in *Williams v. Zobel,* 619 P.2d 448 (Alaska 1980), held the 1980 Permanent Fund income distribution statute did not violate the equal protection clauses of the Alaska and United States Constitutions. *Id.* at 464. That court carefully examined the statute's purposes (listed in the statute itself, ch. 21 SLA 1980 § 1(b)) and held "that the purposes underlying this statute are legitimate under state law." *Id.* at 459.

It is important to note that under article IX, section 6 of the Alaska Constitution, no appropriation of public money may be made "except for a public purpose". It is therefore clear that there was a "public purpose" behind the Permanent Fund dividend program.

The United States Supreme Court reversed *Williams v. Zobel, supra,* holding "that the Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment." *Zobel v. Williams,* 457 U.S. 55, 65 (1982). The Court pointed out that the Alaska Supreme Court had relied on a single justification to support the retrospective application of the dividend

program favoring established residents over new residents. The justification—to reward citizens for past contributions—was found to be constitutionally unacceptable by the United States Supreme Court. As stated by the Court:

> In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then.

Id.

Section 4 of the 1980 Act provided that invalidation of any portion of the dividend distribution plan rendered the whole plan invalid.

> Sec. 4. If any provision enacted in sec. 2 of this Act is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then . . . all provisions enacted in sec. 2 of this Act are invalid and of no force or effect.

Ch. 21 SLA 1980 § 4. Consequently, the decision in *Zobel v. Williams, supra,* would have rendered the whole dividend program invalid if the Alaska legislature had not enacted substitute legislation.

In anticipation of a possible reversal of the Alaska Supreme Court decision, the Alaska legislature considered and passed a bill amending the 1980 Act so that, in the event the United States Supreme Court found any of its terms unconstitutional, they would immediately be replaced with constitutionally sound provisions. This "backstop" legislation (ch. 102 SLA 1982) became operative shortly after the United States Supreme Court decision in *Zobel* and was codified as AS 43.23.005-.095. The legislature did

not amend the purposes of the 1980 Act when it enacted the "backstop" legislation in 1982.

The 1982 Act provided payment of $1,000 as a 1982 dividend to each eligible resident, including children. The 1983 dividend payment to each resident Alaskan was $386. In 1983 and thereafter, each Alaskan resident receives, by law, a pro rata share of the total amount available for distribution.

The amount available for distribution is one-half of the average net income of the Permanent Fund over a five-year period. An individual is eligible for a Permanent Fund dividend so long as he or she is a state resident of at least six months' duration (AS 43.23.005) and intends to remain permanently in the state (AS 43.23.095(7)).

After enactment of the Permanent Fund dividend program, the Department of Revenue sought advice from the Internal Revenue Service by letter dated November 19, 1980, concerning the tax treatment of the dividends. In Private Letter Ruling 8121122, dated February 27, 1981, the IRS informed the state that the dividends were not gifts but would be taxable as income. The IRS has also issued Revenue Ruling 85-39, 1985-13 I.R.B. 5, in which it determined that monies received by Alaskans from the Alaska natural resource wealth through the dividend program would be taxed as income under section 61 of the Internal Revenue Code.

After *Zobel* was decided and the "backstop" legislation went into effect, it became apparent that some minors who received only the $1,000 dividend were required to file an income tax return, even though they would owe no

tax. United States Senator Murkowski proposed an amendment to pending federal legislation that would require a tax return only of someone who received more than $1,000 in income. Then, as now, a tax return was required of anyone receiving income in the amount of $1,000 or more. As ultimately passed on January 6, 1983, section 542(a) of Public Law No. 97-424 provides that:

> Nothing in section 6012(a) of the Internal Revenue Code of 1954 shall be construed to require the filing of a return with respect to income taxes . . . by an individual whose only gross income for the taxable year is a grant of $1,000 received from a State which made such grants generally to residents of such State.

96 Stat. 2195 (1983). This legislation obviated the need for some minors to file returns.

The state began mailing dividend checks after the *Zobel* decision. Attached to each check was a statement that the dividend amount must be reported as taxable federal income.

II.

THE LAWSUITS

The three cases presently before the Court, which have been consolidated for purposes of resolving dispositive motions, each raise the question of the correct tax treatment of dividends received from the Alaska Permanent Fund. The central issue is whether the Alaska Permanent Fund dividends are included in gross income.

Case No. A85-209 Civil was brought by Plaintiff Mary Elizabeth Beattie, an Alaska resident and a minor. J. Patrick Beattie is Plaintiff's father. The suit is for the

refund of taxes alleged to have been erroneously and illegally assessed against and collected from Plaintiff.

In Plaintiff's income tax return for the calendar year 1983, Plaintiff reported as gross income two payments from the Alaska Permanent Fund: a $1,000 payment relating to 1982 and a $386.15 payment relating to 1983. Plaintiff paid the appropriate federal income tax on these payments. Thereafter, Plaintiff filed a refund claim for the year 1983 with respect to the payments described above. On March 14, 1985, the district director mailed to Plaintiff a formal notice of disallowance of Plaintiff's claim for refund.

Plaintiff argues she has no liability for the aforementioned income tax and is entitled to recover from Defendant the sum of $44 plus interest, costs, and attorney's fees. Plaintiff further states that she is the sole owner of her claim against the Defendant and has made no assignment of that claim.

Case No. A85-359 Civil was brought by Plaintiff David J. Greisen, a minor, by and through his father and natural guardian, Ronald E. Greisen, for the recovery of IRS taxes and interest alleged to have been erroneously and illegally collected from Plaintiff.

Plaintiff Greisen was born in Anchorage, Alaska, on August 30, 1982. In order to verify his son's eligibility for the Alaska Permanent Fund dividend program, Plaintiff's father submitted a form to the State of Alaska on which Plaintiff's eligibility for the dividend was verified.

Plaintiff Greisen received $1,000 from the Alaska Permanent Fund dividend program in 1982. For the cal-

endar year ending December 31, 1982, Plaintiff timely filed a federal income tax return in which the $1,000 Alaska Permanent Fund dividend was included as gross income. Plaintiff timely paid the tax shown to be due on his 1982 federal income tax return in the amount of $2. Plaintiff filed a timely claim for refund of such tax paid for the year ending December 31, 1982, which claim was filed in May of 1985.

Plaintiff Greisen alleges in his complaint that the aforementioned $1,000 Alaska Permanent Fund dividend received by him was not gross income under section 61 of the Internal Revenue Code, 26 U.S.C. § 61, because the $1,000 constitutes a gift and thus is excludable under section 102 of the Code, 26 U.S.C. § 102, and furthermore that the $1,000 is not of the nature of income as defined by section 61.

Plaintiff Greisen prays for judgment in the amount of $2 plus interest, costs, and attorney's fees, and asks that the United States and the IRS be enjoined from including Alaska Permanent Fund dividends in the gross income of persons who receive such dividends. Plaintiff further states that he is the sole owner of his claim against Defendant and has made no assignment of that claim.

Case No. A85-387 Civil was brought by Plaintiff Catherine Anne Beattie, an Alaska resident and a minor. J. Patrick Beattie is Plaintiff's father. The suit is for the refund of taxes alleged to have been erroneously and illegally assessed against and collected from Plaintiff.

This action is brought by Plaintiff Beattie as a class action, on her own behalf and on behalf of all others simi-

larly situated, under the provisions of Rule 23, Federal Rules of Civil Procedure, for a determination of whether payments from the Alaska Permanent Fund are gross income under the federal income tax. To date, Plaintiff has not sought certification of the class as required by Rule 23. Consequently, she currently represents only herself.

In Plaintiff Beattie's income tax return for the calendar year 1983, she reported as gross income two payments from the Alaska Permanent Fund: a $1,000 payment relating to 1982 and a $386.15 payment relating to 1983. Plaintiff paid the appropriate federal income tax on these payments.

On approximately May 8, 1985, Plaintiff Beattie filed a claim for refund for the year 1983 with the appropriate IRS office. In this claim she requested refund of the income taxes paid with respect to the payments described above. On approximately June 14, 1985, the district director mailed to Plaintiff by registered mail a formal notice of Plaintiff's claim for refund.

Plaintiff Beattie argues that she has no liability for the income tax and is entitled to recover from Defendant the sum of $57.40, plus interest, costs, and attorney's fees. Plaintiff further states that she is the sole owner of her claim against Defendant and that she has made no assignment of the claim.

Jurisdiction is conferred upon this Court in all three cases by virtue of 28 U.S.C. § 1346(a)(1).

Defendant United States of America (hereinafter "the Government") denies in all three cases that taxes were assessed or collected erroneously or illegally from the

Plaintiffs. Although the Government has denied "for lack of knowledge or information" that Plaintiff May Elizabeth Beattie is the sole owner of her claim against the United States and has made no assignment of that claim, it is evident from the memoranda now before the Court that there really is no controversy involving her ownership and non-assignment of her claim. All other basic facts are admitted with the exception that the Government maintains that the Plaintiffs are liable for the taxes that were paid.

Plaintiffs Mary Elizabeth Beattie and David J. Greisen have moved for summary judgment. The Government opposes these motions and has cross-moved for summary judgment in its favor. Plaintiff Catherine Anne Beattie has not moved for summary judgment. The Government seeks summary judgment against her.

Plaintiff Mary Elizabeth Beattie's motion for summary judgment requests the court to hold that, under federal income tax law and the facts of this case, the Permanent Fund dividend is a gift excluded from federal taxation. She argues that the Permanent Fund dividend payments distributed by the State of Alaska to residents of the state are excludable from gross income as gifts under the Internal Revenue Code, section 102. The rationale behind her argument is as follows.

According to Plaintiff, the state's dominant reason for making the Permanent Fund dividend payments was to distribute excess oil wealth. The payments were made out of detached and disinterested generosity. Neither the state's dominant reason, nor its two subsidiary reasons

(population stability and interest in management), provided the State of Alaska with substantial benefits according to Plaintiff. Rather, any benefits which accrued to the state were incidental and closely analogous to the benefits that inure to the general public from transfers for charitable purposes.

In his motion for summary judgment, Plaintiff David J. Greisen moves that the Court hold that the payments made by the State of Alaska under the Permanent Fund dividend program are not "income" within the meaning of the sixteenth amendment to the Constitution of the United States, and thus Revenue Ruling 85-39, 1985-13 I.R.B. 5, is unconstitutional and void. In short, his motion presents the question whether, by virtue of the sixteenth amendment, Congress has the power to tax as income to the recipient the payments made by the State of Alaska under the Permanent Fund dividend program.

Plaintiff Greisen, in his opposition to the Government's cross-motion for summary judgment, more or less adopts the Beattie "gift" argument and requests the court to find that the payments made by the state under the Permanent Fund dividend program are gifts and thus excludable from gross income under section 102 of the Internal Revenue Code.

The Government has moved for summary judgment in its own behalf in all three cases, taking the position that the Permanent Fund payments are income and they are not a "gift". The Government's argument is founded upon section 61 of the Internal Revenue Code which states that, except as otherwise provided, gross income means

"all income from whatever source derived", 26 U.S.C. § 61(a). In defining gross income as broadly as it did, Congress intended, it is argued, to tax all gains except those specifically exempted. The Government's position is that the only possible exemption of any application in the present case is the gift exemption; however, the Government views the gift exemption as having no application to state paid dividends made pursuant to the express legislative purposes outlined in ch. 21 SLA 1980 § 1(b).

III.

DISCUSSION

This Case May Properly Be Decided By Summary Judgment

Plaintiff Mary Elizabeth Beattie argues that the determination of whether a transfer constitutes a gift under section 102 of the Internal Revenue Code is a question of fact to be determined by a jury. She further argues that a decision concerning intention is a question of fact which generally should not be decided by summary judgment. *Sankovich v. Life Insurance Co. of North America,* 638 F.2d 136, 140 (9th Cir. 1981); *Hotel & Restaurant Employees & Bartenders International Union v. Rollison,* 615 F.2d 788, 793 (9th Cir. 1980).

In support of her position, she quotes the Supreme Court's statement in *Commissioner v. Duberstein,* 363 U.S. 278 (1960):

> Decision . . . must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. . . .[T]he multiplicity of rele-

> vant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

Id. at 289. She also refers the court to Wright, Miller, and Kane's view that:

> Inasmuch as a determination of *someone's* state of mind usually entails the drawing of factual inferences as to which reasonable men might differ—a function traditionally left to the jury—summary judgment often will be an inappropriate means of resolving an issue of this character.

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2730 at 238 (2d ed. 1983), emphasis added.

Plaintiff Beattie's conclusion—that this case cannot be decided on motion for summary judgment but instead must be decided by a jury after consideration of all the factual evidence—is incorrect.

While *Duberstein* does stand for the proposition that intent is determinative in the gift context and that intent is a question of fact, the Supreme Court in *Duberstein* was dealing with gifts in a business setting where interpersonal relations motivated transfers of property. Given the interpersonal context of the transfer in *Duberstein,* it was important for the Supreme Court to emphasize that a decision be based on the "fact-finding tribunal's experience with the mainsprings of human conduct." In short, the focus of inquiry was on the state of mind or intent of an individual concerning a transfer of property in an interpersonal context.

Similarly, Plaintiff's aforementioned quotation from Wright, Miller, and Kane was also directed to an evaluation of an individual's state of mind.

In the present case, however, the transferor is a state rather than an individual, and therefore notions of intent applicable in an interpersonal context have no bearing. *Cf., Joshel v. Commissioner,* 296 F.2d 645, 647-48 (10th Cir. 1961) (a personal-emotions test is inapplicable in the case of corporations). We are not dealing with a normal gift situation where a natural person makes a gift to someone else under circumstances which may or may not reflect the motives or intent of the donor. Rather, the State of Alaska has made Permanent Fund dividend payments pursuant to the express legislative purposes outlined in ch. 21 SLA 1980, section 1(b). The nature and purpose of these Permanent Fund dividend payments must be gleaned from an interpretation of the authorizing statute. Such statutory interpretation does not involve fact finding. It involves legal analysis beginning with the plain language of the statute and, where appropriate, consideration of the underlying legislative history.

Plaintiff David J. Griesen argues that a determination of the legislature's dominant motivation for making the Permanent Fund dividend payments is a question of fact to be decided by a jury. Plaintiff Greisen's citation to *Olk v. United States,* 536 F.2d 876, 878 (9th Cir. 1976), *cert. denied,* 429 U.S. 920 (1976), is inapposite for the same reason that Plaintiff Beattie's reliance on *Duberstein* was misplaced. *Olk,* like *Duberstein,* involved a determination of the intent of an individual concerning the transfer of property in an interpersonal context. It did

not involve a determination of legislative intent as does the instant case.

Legislative intent is a question of law for the court, not a question of fact for a jury. The court's task in all cases of statutory construction is to interpret the words of the statute in light of the purposes the legislature sought to serve. *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co. of Virginia*, — U.S. —, 104 S.Ct. 304, 307 (1983); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

The court, therefore, concludes that there are no factual issues to be decided concerning whether the legislature intended the Permanent Fund dividend payments to be gifts. Furthermore, the court points out that the parties taking the position that there are factual issues have not filed any statement of genuine issues as required by the local rules.

For the aforementioned reasons, the court is free to decide this case on motion for summary judgment and will now proceed to an analysis of the legislative intent behind the Permanent Fund dividend payments.

Alaska Permanent Fund Dividends Are Not "Gifts"

The leading case concerning whether a transfer of property is a gift is *Commissioner v. Duberstein*, 363 U.S. 278 (1960). In *Duberstein*, the Court reviewed the established cases and made the following series of observations concerning the meaning of the term "gift" in section 102(a) of the Internal Revenue Code:

[T]he statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co. v. Commissioner,* 279 U.S. 716, 730. And, importantly if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus v. Commissioner,* 302 U.S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson v. United States,* 343 U.S. 711, 714. A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner v. LoBue,* 351 U.S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson v. United States, supra,* at 714. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention". *Bogardus v. Commissioner,* 302 U.S. 34, 43. "What controls is the intention with which payment, however voluntary, has been made." *Id.* at 45 (dissenting opinion).

. . . Moreover, the *Bogardus* case itself makes it plain that the donor's characterization of his action is not determinative—that there must be an objective inquiry as to whether what is called a gift amounts to it in reality. 302 U.S. at 40. It scarcely needs adding that the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter.

. . . We take it that the proper criterion, established by decision here, is one that inquires what the

> basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer.

363 U.S. 278 at 285-86.

Plaintiffs here argue that the Permanent Fund dividend payments were gifts. The Government contends otherwise. Everyone, by and large, relies upon traditional concepts of what is or is not a gift for purposes of the tax laws, even though these concepts do not "fit" particularly well when the alleged donor is a governmental entity.

It should be noted at the outset that the State of Alaska can, in a sense, give away money or land to citizens of the state without consideration so long as the giving is supported by a public purpose. Alaska Const. art. IX, § 6.

In its preamble to the statement of purpose for the Permanent Fund dividend program, the legislature of the State of Alaska expressly characterizes its undertaking as being one arising out of "the duty and policy of the state with respect to the natural resources belonging to it", ch. 21 SLA 1980 § 1(a). While we may well debate whether or not the state was in fact under such a duty, it is abundantly clear that the legislature considered itself under some form of obligation to make the payments in question. Whether the obligation felt by the legislature did or did not exist in law or fact, or whether it was a moral obligation or some other kind of obligation, makes no difference. What is important is that the legislature clearly conveyed the notion that it felt constrained—that is, required—to make the payments. Such is not the stuff of which "gifts" are made. Rather than bespeaking a "detached and disinterested generosity", we are left with the clear understanding that the legislature saw itself trans-

ferring what was due and owing (although not in a legal sense) to the residents of the State of Alaska. Conversely, there is nothing in the acts authorizing the dividend payments (ch. 21 SLA 1980 and ch. 102 SLA 1982) or in the legislative history of those acts which expresses the intent or purpose of effecting a "gift".

For purposes of section 102 of the Internal Revenue Code and *Duberstein*, gifts must proceed "out of affection, respect, admiration, charity, or like impulses". The Permanent Fund dividend payments did not proceed from such considerations. Instead, they proceeded from a legislatively perceived concept of duty in furtherance of a public purpose—without which purpose the gift of money could not be constitutionally possible. Alaska Const. art. IX, § 6. Had the Alaska Supreme Court not found a supporting public purpose in *Williams v. Zobel, supra,* 619 P.2d 448, the disbursement would have been unconstitutional by state standards.

The stated public purposes of the acts authorizing the dividend payments were to: (a) effect an equitable distribution of a portion of the state's wealth, (b) encourage residential longevity in Alaska, and (c) encourage involvement by residents in the management and expenditure of the Permanent Fund. It is clear from the foregoing stated public purposes that there is no suggestion whatsoever of the payments being made on account of affection, respect, admiration, charity, or like impulses.

To the extent that the *Duberstein* concepts of "gift" for purposes of the tax laws are here applicable, the court concludes that the Permanent Fund dividend payments are not "gifts". Furthermore, as previously mentioned, these

traditional concepts of "gift" for purposes of the tax laws do not "fit" particularly well when the alleged donor is a governmental entity. For this reason, the court concludes that a public transfer of money by act of a state legislature in furtherance of a public purpose is *sui generis* —that is, in a class by itself. Such a transfer by a state legislature of public money for a public purpose is simply not a gift.

On the other hand, Congress which imposes the federal income tax can indicate explicitly or through legislative intent that a payment it makes shall be treated as a gift and excluded from gross income. *See Dewling v. United States,* 101 F. Supp. 892, 893 (Ct. C. 1952), where payments to citizens for past services constructing the Panama Canal were determined to be gifts based upon the congressional intent that the payments be viewed as a "thank-offering" for services rendered. *Also see, United States v. Hurst,* 2 F.2d 73 (Wyo. 1924), where the court employed a similar "compensation for past services" rationale for establishing the basis of a gift. As stated by the court, "[i]f there can be a reward offered . . . for past services to the government, upon the same theory why cannot a reward be offered to a discoverer of mineral deposits?" *Id.* at 80. *Dewling* and *Hurst,* however, are inapposite to the present case which involves payments made pursuant to the act of a state legislature. Although Congress may indicate that a payment be treated as a gift and excluded from gross income, a state legislature does not have the power to control the meaning of federal tax legislation, nor did the Alaska legislature purport to do so in this case.

The Court concludes that the Permanent Fund dividend payments were made for a public purpose and were not gifts for purposes of section 102 of the Internal Revenue Code. The court can find in the acts authorizing such payments no express or other clear legislative intent to effect a gift.

Permanent Fund Dividend Payments Are Income

The sixteenth amendment provides that "incomes, from whatever source derived," may be taxed. In furtherance of the sixteenth amendment, Congress in 1954 adopted section 61(a) of the Internal Revenue Code, which provides that gross income includes "all income from whatever source derived."

The legislative history of section 61 clearly indicates a congressional intent to tax income to the fullest extent permitted under the sixteenth amendment. The house report speaks of the "all-inclusive nature of statutory gross income" and states that the definition of gross income found in section 61(a) "is based upon the 16th Amendment [with] the word 'income' . . . used in its constitutional sense." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A18; *see also,* S. Rep. No. 1622, 83d Cong., 2d Sess. 168; *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426, 432 (1955); *Commissioner v. LoBue,* 351 U.S. 243, 246 (1956).

Plaintiff Greisen argues that the only reliable definitions of "income" for the purposes of this case are those formed in the context of construing the Constitution. Definitions of income made in the context of construing the Internal Revenue Code are viewed by Plaintiff as ap-

plicable in the instant case only to the extent they are consistent with those formed in the context of construing the Constitution.

Plaintiff argues that the United States Supreme Court's definition of income in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) cannot be applied in this case because it was made in the context of construing the Internal Revenue Code, not the sixteenth amendment.

In *Glenshaw Glass* the Supreme Court was confronted with the question of whether punitive or treble damage awards are taxable. In holding that punitive damages and the multiplier effect (two-thirds) of treble damages were income and taxable, the Supreme Court characterized those damage payments as:

> [U]ndeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.

Id. at 431.

The Government relies upon *Glenshaw Glass's* "undeniable accessions to wealth" definition of income for support of its proposition that the Permanent Fund dividend payments are income and are taxable. There is no question but that the Permanent Fund dividend payments received by Plaintiffs fit the *Glenshaw Glass* definition of income. The difficulty with applying *Glenshaw Glass* to the argument made in the instant case is that in *Glenshaw Glass* the taxpayers had conceded that there was no constitutional barrier to imposition of a tax upon punitive damages. Accordingly, the United States Supreme Court never addressed the question of whether such payments were within the purview of the sixteenth amendment. The Supreme Court quite properly held:

> We would do violence to the plain meaning of the statute and restrict a clear legislative attempt to bring the taxing power to bear upon all receipts constitutionally taxable were we to say that the payments in question here are not gross income.

Id. at 432-33, emphasis supplied.

Thus *Glenshaw Glass* is a statutory construction case that does not answer the question: Is the payment made to the taxpayer "income" for purposes of the sixteenth amendment to the United States Constitution? While the above-quoted language may be susceptible to some misunderstanding since it makes reference to that which is "constitutionally taxable", a careful reading of *Glenshaw Glass* leaves no doubt but that the United States Supreme Court was not asked to and did not address the constitutional question of what is income.

Plaintiff Greisen points to a number of U.S. Supreme Court decisions to support his conclusion that "income" as used in the sixteenth amendment means the fruits of labor and capital, and that it is the "commonly understood meaning of the term" income that is appropriate in the context of construing the Constitution. *Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 519 (1921); *Eisner v. Macomber*, 252 U.S. 189, 207 (1920); *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 89 (1936). *See also, Roberts v. Commissioner*, 176 F.2d 221, 225 (9th Cir. 1949).

Employing this definition, Plaintiff Griesen argues that the Permanent Fund dividend payments are neither the fruits of labor or capital, nor are they "income" in the layman's sense of the word. Plaintiff contends that

the commonly understood meaning of the term income at the time of the adoption of the sixteenth amendment was such that "any payment must be from a source external to the recipient". As Plaintiff points out, this is consistent with the term's entymology as "a coming in" of wealth from a source exterior to the taxpayer. He argues that the Permanent Fund dividend payments are not from an outside or third-party source since it is the people's natural resources and the people's income from those resources which the legislature is disbursing to the people of the State of Alaska.

If we accept, and for purposes of this discussion the court does accept, Greisen's definition of "income", there is no question but that the payment from the State of Alaska is an addition or a "coming in" to the taxpayer's wealth. However, it is clear that the payment in question comes from an exterior source.

Neither the resources in question, nor the proceeds from the same, nor the income from those proceeds, are the "property" of any person who resides in the State of Alaska. As Greisen argues, the people in some very real sense do have ultimate sovereignty and are the ultimate masters of the state. But that does not make the people the "owners" of that property which is the subject of this discussion. In adopting their constitution, the people of the State of Alaska have very clearly constituted the *state* as owner of the natural resources which give rise to the fund in question. Alaska Const. art. VIII, §§ 1 and 2.

Article VIII of the Constitution of the State of Alaska deals generally with natural resources which are, of course, the source from which the Permanent Fund has

grown. Article VIII, section 1, provides that "[i]t is the policy of the State to encourage the settlement of *its* land and the development of *its* resources by making them available for maximum use consistent with the public interest." Alaska Const. art. VIII, § 1, emphasis added. Section 2 mandates that:

> The legislature shall provide for the utilization, development, and conservation of all natural resources *belonging to the State,* including land and waters, for the maximum benefit of its people.

Alaska Const. art. VIII, § 2, emphasis added.

It is clear from the plain language of Article VIII that the people of Alaska have constituted the State of Alaska as owner of the natural resources which are the source of the Permanent Fund dividend payments.

Surely the Plaintiffs here would not argue that corporate dividends are not taxable because the shareholders of a corporation own the underlying assets and are therefore simply taking what is already theirs when they receive dividend checks. While the analogy may not be perfect, the Court does not see the State of Alaska Permanent Fund dividends as being substantially different from a corporate dividend insofar as Greisen's argument is concerned. Private individuals form corporations, charter them to own certain assets, and hopefully see the corporation prosper. The shareholders of the corporation have the ultimate power to require the corporation to pay dividends. Yet we do not for a moment think that the individual shareholders "own" the corporate assets or that the dividends, when declared, are not taxable. Just as

one can create a corporation and by law have it constituted a separate legal person, so too the people of the State of Alaska have created a distinct legal person, capable of owning property and receiving the income from that property when they chartered the State of Alaska through the constitution. The people still hold the ultimate power; but they do not "own" the natural resources nor the proceeds from the same nor the Alaska Permanent Fund so as to be able to claim dividend payments as their own property before distribution.

Although Greisen does not really address the broader question of "what are the outside parameters of 'incomes' " as used in the sixteenth amendment, the court is satisfied that payments by the State of Alaska of income from its Permanent Fund are "income" to the recipients. The sixteenth amendment expressly provides that income "from whatever source derived" is taxable, and the plain meaning of those words is broad enough to encompass a monetary payment from a state to its residents. Thus this court concludes that the Alaska Permanent Fund dividend payments are income for purposes of the sixteenth amendment to the United States Constitution. It necessarily follows that these payments are gross income under section 61 of the Internal Revenue Code.

IV.

CONCLUSION

Since the Alaska Permanent Fund dividend payments are income and since these payments are not excludable from gross income as "gifts", they are therefore subject to the federal income tax.

The motions of Mary Elizabeth Beattie and David J. Greisen for summary judgment are denied. The Government's cross-motion for summary judgment against Mary Elizabeth Beattie and David J. Greisen and its motion for summary judgment against Catherine Anne Beattie are granted. The Clerk of Court shall enter judgment dismissing all three complaints with prejudice.

DATED at Anchorage, Alaska, this 13th day of March, 1986.

/s/ H. Russel Holland
United States District Judge

cc: David Shaftel
Ron Zobel
Steven O'Hara
U.S. Attorney

LAWS OF ALASKA

SEAL

1980

Source
FCCSSB 122

Chapter No.
21

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 10

Approved by the Governor: April 15, 1980

Actual Effective Date: April 16, 1980 with Sections 1 and 2 retroactive to January 1, 1979.

Chapter 21

AN ACT

Providing for the payment of Alaska permanent fund income to state residents; and providing for an effective date.

* Section 1. POLICY, PURPOSES AND FINDINGS. (a) It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state.

(b) The purposes of this Act are

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of

the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

(c) The legislature finds that the accrual of permanent fund dividends provided in AS 43.23 enacted in sec. 2 of this Act, based on full years of residency since January 1, 1959, fairly compensates each state resident for his equitable ownership of the state's natural resources since the date of statehood. It is in the public interest to distribute a portion of Alaska's energy wealth to the people of the state.

(d) The legislature also finds that state residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans. It is in the public interest to return to state residents a portion of the state's income from oil, gas, and other mineral production to help offset rising fuel costs.

(e) The legislature also finds that there exists in the state a serious problem of population turnover. A substantial portion of the state's population is comprised of individuals who reside in Alaska for only a relatively short

time. This constant turnover in population leads to political, economic, and social instability and is harmful to the state. It is in the public interest for the state to promote a stable resident population by providing an incentive to encourage Alaskans to maintain their residency in the state.

* Sec. 2. AS 43 is amended by adding a new chapter to read:

CHAPTER 23. PERMANENT FUND DIVIDENDS.

Sec. 43.23.010. ELIGIBILITY FOR PERMANENT FUND DIVIDEND. (a) An individual who is eligible under (b) of this section is entitled to one permanent fund dividend for each full year that the individual is a state resident after January 1, 1959.

(b) For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

(1) is at least 18 years of age; and

(2) is a state resident during all or part of the year for which the permanent fund dividend is paid.

(c) To determine the number of permanent fund dividends to which an individual is entitled under (a) of this section, a year in which the individual is a state resident for less than 12 months may not be counted, but a payment of a permanent fund dividend may be made for that year under (f) of this section. A year for which an individual was entitled to payment of a dividend but failed to file a claim may be counted to determine the number of dividends under (a) of this section.

(d) An individual may receive payment of a permanent fund dividend in a single payment or in 12 equal installments paid monthly by the department.

(e) An individual eligible to receive payment of a permanent fund dividend may elect to defer receipt of that payment. The commissioner shall adopt by regulation a plan which, to the extent permitted under federal law, will allow an individual to defer payment of federal and state income taxes on the payment of permanent fund dividends until the individual actually receives the payment.

(f) If an individual who is eligible under (b) of this section was a state resident for less than 12 months during the year immediately preceding the year in which a claim is filed, the individual is entitled to payment of one prorated dividend. If that individual is also entitled to dividends under (a) of this section based on previous years as a state resident, he is entitled to receive a prorated payment for the total number of permanent fund dividends to which he is entitled under (a) of this section. A prorated dividend or prorated payment under this subsection shall be prorated on the basis of the number of months that the individual was a state resident during the year immediately preceding the year in which the dividend is claimed.

Sec. 43.23.020. PROOF OF ELIGIBILITY. (a) The commissioner shall adopt regulations under the Administrative Procedure Act (AS 44.62) for determining the eligibility of individuals. The commissioner may require an individual to provide proof of eligibility, or he may use other information available to him from other state departments or agencies to determine the eligibility of individuals. The commissioner may establish procedures for paying the permanent fund dividends along with other payments of money or state benefits.

(b) The department may prescribe and furnish an application form for claiming a permanent fund dividend which contains

(1) a statement of eligibility and a certification of residency in substantially the following form:

I certify that I am a state resident on the date of this application and I have been a state resident for — full years and that I understand that my claim for a permanent fund dividend is determined by the length of my residence in the state after January 1, 1959. I also understand that a false claim of residency to obtain a permanent fund dividend is a criminal offense and that if convicted I will forfeit all permanent fund dividends and that I must repay all permanent fund dividends which have been paid to me. I understand that this penalty is in addition to any criminal penalties imposed.

_____

(signature of individual)

and

(2) a statement advising the individual that he may choose to receive the payment of a permanent fund dividend in a single payment or in 12 installments payable monthly and a space where the individual may indicate his choice of payment.

Sec. 43.23.030. AMOUNT OF DIVIDEND. By December 1 of each year the commissioner shall give public notice of the value of each permanent fund dividend to be paid in the following year. The commissioner shall determine the value of a permanent fund dividend by

(1) determining the amount of income of the Alaska permanent fund transferred to the dividend fund under AS 43.23.050(b) in the current year, less the amount, if any, to be repaid in the current year to the general fund under AS 43.23.050(c);

(2) determining the number of permanent fund dividends paid during the current year; and

(3) dividing the amount determined in (1) of this section by the amount determined in (2) of this section.

Sec. 43.23.040. PENALTIES AND ENFORCEMENT. (a) In addition to any criminal penalties imposed by state law, if an individual is convicted of unsworn falsification for a statement made in a certification of residency made for purposes of this chapter, and the conviction is not reversed, that individual is not, and may never become, eligible for a permanent fund dividend, and he forfeits all permanent fund dividends paid to him.

(b) If the commissioner determines that a permanent fund dividend should not have been claimed by or paid to an individual, he may use any collection procedures or remedies available under this title to recover the payment of a permanent fund dividend which was improperly made.

Sec. 43.23.050. DIVIDEND FUND ESTABLISHED. (a) The dividend fund is established as a separate fund in the state treasury. The dividend fund shall be administered by the commissioner and may be invested by the commissioner in the same manner provided for the investment of the Alaska permanent fund under AS 37.13.120. Money in the dividend fund and any interest earned from investment of money in the dividend fund shall be used to pay permanent fund dividends annually and to repay loans from the general fund as provided in (c) of this section.

(b) Each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which was earned during the fiscal year ending on June 30 of the preceding year and which is available for distribution under AS 37.13.140.

(c) The legislature may annually appropriate money from the general fund to the dividend fund if there is not enough money in the dividend fund to pay each eligible individual an annual permanent fund

dividend valued at $50. One-fifth of the amount transferred to the dividend fund each year under (b) of this section shall be annually withdrawn from the dividend fund by the commissioner and deposited in the general fund to repay appropriations made under this subsection.

Sec. 43.23.060. DUTIES OF THE DEPARTMENT. The department shall

(1) by the 10th day of each regular legislative session, present a request to the legislature for an appropriation from the general fund to the dividend fund to satisfy the requirements of AS 43.33.050;

(2) annually pay permanent fund dividends from the dividend fund;

(3) adopt regulations under the Administrative Procedure Act (AS 44.62) which establish procedures and time limits for claiming a permanent fund dividend; the department shall set the time limit for applications for permanent fund dividends so that single-payment permanent fund dividends for a year are paid before October 15 of the following year and so that installment-payment permanent fund dividends for a year begin by October 15 of the following year; and

(4) assist residents of rural areas who because of language, illness, old age, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends.

Sec. 43.23.070. EXEMPTION OF PERMANENT FUND DIVIDENDS. (a) An eligible individual may assign, pledge, or encumber not more than 50 percent of the annual permanent fund dividends which are due and payable or which may become due and payable to the individual.

(b) Fifty percent of the annual permanent fund dividends payable to an individual is exempt from levy, execution, garnishment, attachment, and any other remedy for the collection of a debt.

(c) Fifty percent of the annual permanent fund dividends paid to an individual which are not held separately from other money of the individual is exempt from levy, execution, garnishment, attachment and any other remedy for the collection of a debt.

Sec. 43.23.080. ELIGIBILITY FOR STATE PUBLIC ASSISTANCE PAYMENTS. In determining the eligibility of an individual for old age assistance under AS 47.25.430 - 47.25.610, aid to the blind under AS 47.25.620 - 47.25.780, or aid to the permanently and totally disabled under AS 47.25.790 - 47.25.970, the Department of Health and Social Services may include as income of the individual only the amount of the permanent fund dividends in excess of $1,500 paid to the individual for a year.

Sec. 43.23.090. TAX EXEMPTION. Permanent fund dividends provided under this chapter are exempt from taxation under AS 43.20.

Sec. 43.23.100. DEFINITIONS. In this chapter,

(1) "Alaska permanent fund" means the fund established by art. IX, sec. 15, of the state constitution;

(2) "commissioner" means the commissioner of revenue;

(3) "department" means the Department of Revenue;

(4)"dividend fund" means the fund established by AS 43.23.050;

(5) "individual" means a natural person;

(6) "permanent fund dividend" means a right to receive a payment of money from the dividend fund;

(7) "state resident" means an individual who is physically present in the state with the intent to remain permanently in the state or, if he is not physically present in the state, intends to return to the state and he is absent for the following reasons:

(A) vocational, professional or other special education for which a comparable program was not reasonably available in the state,

(B) postsecondary education,

(C) military service,

(D) medical treatment,

(E) service in Congress, or

(F) other reasons which the commissioner may establish by regulation under the Administrative Procedure Act (AS 44.62);

(8) "year" means a calendar year.

* Sec. 3. For 1979 the value of a permanent fund dividend is $50. The payment of permanent fund dividends for 1979 shall be made from an appropriation from the general fund to the dividend fund for that purpose. The amount appropriated from the general fund to pay permanent fund dividends for 1979 less 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending June 30, 1978, is a loan to the dividend fund from the general fund which shall be repaid as provided in AS 43.23.050(c) enacted by sec. 2 of this Act. The Department of Revenue shall by July 1, 1980, prescribe and make available an application form for claiming permanent fund dividends for 1979. The Department of Revenue shall mail the form to each individual who, before July 1, 1980, filed a resident or part-year resident Alaska

net income tax return for the 1979 tax year under AS 43.20. An eligible individual may receive payment of permanent fund dividends for 1979 if he applies to the Department of Revenue on the form prescribed by the department no later than September 1, 1980. The application must be accompanied by a statement of eligibility as required by AS 43.23.020 enacted it.

Nos. 87-1130 and 87-1244

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARY ELIZABETH BEATTIE AND CATHERINE ANNE BEATTIE, ETC., PETITIONERS

v.

UNITED STATES OF AMERICA

DAVID J. GREISEN, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

ERNEST J. BROWN
RAYMOND W. HEPPER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether amounts paid to petitioners by the State of Alaska pursuant to its Permanent Fund dividend program constituted "income" that can constitutionally be taxed (No. 87-1244).

2. Whether these payments were excludable from taxable income as "gifts" under 26 U.S.C. 102 (both petitions).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12)[1] is reported at 831 F.2d 916. The opinion of the district court (Pet. App. 13-39) is reported at 635 F. Supp. 481.

JURISDICTION

The judgments of the court of appeals were entered on November 5, 1987. The petition for a writ of certiorari in No. 87-1130 was filed on December 30, 1987, and the peti-

[1] "Pet. App." refers to the appendix to the petition in No. 87-1130.

tion for a writ of certiorari in No. 87-1244 was filed on January 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, the State of Alaska amended its Constitution to establish the "Permanent Fund," into which the State must deposit at least 25% of its mineral income each year. Alaska Const. Art. IX, § 15. The constitutional amendment prohibits the legislature from appropriating any of the principal of the Fund, but it permits the State to use the earnings for general governmental purposes. In 1980, the Alaska legislature enacted the Alaska Permanent Fund dividend program (the Act), 1980 Alaska Sess. Laws ch. 21 (*reprinted in* Pet. App. 40-49), to distribute annually to residents of the State a portion of the Fund's earnings. Under this statute, each resident over the age of 18 was to receive an annual dividend equal to one dividend unit for each year of Alaska residence since Statehood. 1980 Alaska Sess. Laws ch. 21, § 2; Pet. App. 42-43.

Section 1 of the Act described its "policy, purposes and findings" (Pet. App. 40). Section 1(a) stated (Pet. App. 40): "It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state." Section 1(b) then described the purposes of the Act as follows (Pet. App. 40-41):

> (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans;

(2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and

(3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund (art. IX, sec. 15, state constitution).

Ronald and Patricia Zobel, who had been residents of Alaska for only a short time, filed an action challenging the validity of the distribution plan. They alleged that the statute, by granting benefits predicated upon length of residence, violated their right to equal protection of the laws and their right to free interstate migration. While the Zobels' case was pending, the Alaska legislature enacted "backstop" legislation to take effect if the durational requirements were invalidated. 1982 Alaska Sess. Laws ch. 102, § 19. This legislation retained the preamble and statement of purposes of the 1980 legislation, but it provided that all persons, including children, resident in the State for six months who intended to remain in the State were to receive a dividend payment from the earnings of the Permanent Fund. When this Court invalidated the original statute insofar as it granted different dividends to those who had resided in Alaska for differing periods of time (*Zobel* v. *Williams*, 457 U.S. 55 (1982)), the "backstop" legislation took effect. Pet. App. 16-18.

As a result, petitioners each received dividend checks, $1,000 for 1982 and $386 for 1983. The State attached to the checks statements notifying the recipients that the dividends constituted income for federal tax purposes.[2]

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[2] Pursuant to a request by the State, the IRS had issued a private ruling, which stated that the dividend payments were taxable income. Priv. Ltr. Rul. 81-21-122 (Feb. 27, 1981). The Internal Revenue Service subsequently published Revenue Ruling 85-39, 1985-1 C.B. 21,

The Beatties, petitioners in No. 87-1130, timely filed federal income tax returns for 1983 including as income the full amount of the dividends received for 1982 and 1983, and they paid the taxes due in the aggregate amount of $101.40. Greisen, petitioner in No. 87-1244, received the $1,000 dividend paid in 1982, filed a federal income tax return for that year reporting the dividend, and paid a tax of $2. Petitioners all filed administrative claims for refund of the taxes paid on the dividends, and those claims were disallowed. Petitioners then brought these two refund suits in the United States District Court for the District of Alaska, where they were consolidated. Pet. App. 19-23.

2. The district court denied petitioners' motions for summary judgment and granted the government's motion for summary judgment (Pet. App. 13-39). The court found that the intent of the Alaska legislature in enacting the statute was ascertainable from the statute itself and its legislative history, and therefore there was no factual question presented in the case that would make summary judgment inappropriate (*id.* at 25-28). Relying on *Commissioner* v. *Duberstein,* 363 U.S. 278 (1960), the court held that the dividends were not gifts excludable from income under Section 102 of the Internal Revenue Code[3] because they were payments by a State for a public purpose that was not the result of donative intent (Pet. App. 28-33). In so concluding, the court found that the preamble to the statement of purposes for the Permanent Fund dividend program made it "abundantly clear that the legislature considered itself under some form of obligation

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concluding that the Alaska dividend payments are includible in gross income.

[3] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

to make the payments in question" (*id.* at 30). The court also rejected the contention that the dividend payments were not "income" that could constitutionally be subject to taxation, explaining that the payments were accessions to wealth over which petitioners had complete dominion and control and therefore fell within the well-recognized definition of income (*id.* at 33-38).

Petitioners' appeals were consolidated in the court of appeals, which affirmed the judgments below (Pet. App. 1-12). The court agreed that the district court had acted correctly in resolving the case at the summary judgment stage, because discerning the State's motivation for making the dividend payments was a matter of interpretation of the statute and its legislative history (*id.* at 5-6). The court rejected the claim that the dividend payments were not "income" and hence could not constitutionally be subject to taxation. The court stated that, even if petitioner Greisen were correct in arguing that mineral deposits belonged to the individual residents of Alaska rather than to the State, that would still not advance his argument because the dividends represented interest from the Permanent Fund, which would be income regardless of the ownership of the principal. *Id.* at 7-8. The court held that the payments were not excludable as "gifts" because the State did not make the payments with donative intent. The court explained that, as the district court had found, the preamble to the statement of purposes in the Act indicated that the dividends were given out of a sense of moral or legal duty. The court also pointed out that the statement of purposes in the Act showed that the legislature acted with the intent of benefitting the State. *Id.* at 8-12.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of ap-

peals. Moreover, the questions presented concern the treatment of payments received under a program that is unique to the State of Alaska, and their resolution depends in large part upon the particular circumstances surrounding the enactment of that program. They are therefore not of broad significance outside the particular context involved here. Accordingly, there is no reason for review by this Court.

1. Petitioner Greisen contends (87-1244 Pet. 6-11) that the taxation of the dividend payments violates the Constitution because those payments are not "income" within the meaning of the Sixteenth Amendment. This contention is without merit for two fundamental reasons.

a. First, petitioner misapprehends the constitutional basis for the tax on the dividend payments. Article I, Section 8, Clause 1 of the Constitution provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises * * *." This Court has long recognized that this provision confers upon Congress a comprehensive power to tax. See, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 581 (1937); *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 12 (1916); *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867). This power is not completely unfettered; it was made subject to certain specific constitutional limitations, including the requirement that "direct [t]axes" must be apportioned according to population. Art. I, § 2, Cl. 3; see also Art. I, § 9, Cl. 4.

It was always apparent that this limitation on direct taxation applied to taxes on real estate. See, *e.g.*, *Springer* v. *United States*, 102 U.S. 586, 600-601 (1881); *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796). In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, on reh'g, 158 U.S. 601 (1895), this Court held that, like a tax on real property, taxes on personal property and taxes on income derived from property were also direct taxes. Accordingly,

the Court held that an income tax on rent, interest, and corporate dividends was a direct tax requiring apportionment under the Constitution. The Court was explicit in stating that it was considering taxes only on those forms of income. See 158 U.S. at 635.

The passage of the Sixteenth Amendment, which granted Congress the power to tax "incomes, from whatever source derived, without apportionment among the several States," removed the constitutional impediment to unapportioned taxation of the forms of income involved in *Pollock*. But the Sixteenth Amendment imposed no limitations on the comprehensive taxing power granted to Congress by Article I, Section 8, Clause 1, which remains the source of Congress's power to impose any form of taxation, including income taxes. The purpose and effect of the Sixteenth Amendment was to *expand* Congress's power to tax income. As this Court recognized in the seminal cases decided soon after the adoption of the Sixteenth Amendment and the enactment of the Income Tax Act of 1913, ch. 16, § 2, 38 Stat. 166, the Amendment was needed to permit the imposition of "direct" income taxes without apportionment, but it was not necessary for taxation of other forms of income not at issue in the *Pollock* case. See *Brushaber* v. *Union Pac. R.R.*, 240 U.S. at 17-18; *Stanton* v. *Baltic Mining Co.*, 240 U.S. 103, 112-113 (1916); see also 1 B. Bittker, *Federal Taxation of Income, Estates, and Gifts* ¶¶ 1.2.2, 1.2.3 (1981). Thus, regardless of the definition of the term "income" in the Sixteenth Amendment, Congress has the power under Article I, Section 8, Clause 1, to impose an income tax that would not have been regarded as a direct tax before that Amendment was passed. Accordingly, it

has the power to tax income such as that received by petitioners from the State of Alaska.[4]

b. Even accepting for purposes of argument petitioner's premise that the Sixteenth Amendment is the sole source of congressional power to tax income, there is no merit to petitioner's contention that taxing the dividend payments is unconstitutional. It is well recognized that Congress, in the enactment of income tax statutes, has intended to reach all "income" within its constitutional power, except that specifically excluded by statute. See, *e.g., Commissioner* v. *Kowalski,* 434 U.S. 77, 82-83 (1977); *Helvering* v. *Clifford,* 309 U.S. 331, 334 (1940). Indeed, this intent was explicitly stated in the legislative history when Congress enacted the Internal Revenue Code of 1954. See H.R. Rep. 1337, 83d Cong., 2d Sess. A18 (1954); S. Rep. 1622, 83d Cong., 2d Sess. 168 (1954) ("the word 'income' [in Section 61(a)] is used in its constitutional sense").

The commonly accepted definition of "income" was enunciated by this Court in *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426 (1955), where the Court concluded that punitive damages could be taxed. Petitioner admits (87-1244 Pet. 6) that that definition—"undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" (348 U.S. at 431)—

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[4] Though he does not explicitly make the contention in this Court, petitioner Greisen argued in the courts below that the citizens of Alaska owned the State's mineral resources and hence the tax on the dividend payments was not on income, but rather was a direct tax on property. As the district court demonstrated (Pet. App. 36-38), the premise of this contention is erroneous; the Alaska Constitution itself makes clear that the mineral resouces belong to the State. In any event, even if petitioner's premise were correct, *Stanton* v. *Baltic Mining Co., supra,* is direct authority for the proposition that income derived from such mineral resources is subject to federal taxation.

covers the payments at issue here. Petitioner's contention appears to be that the *Glenshaw Glass* definition is a definition of "income" only within the meaning of Section 61(a) of the Code, but that the constitutional definition of "income" is narrower. But there is simply no basis for concluding that this Court in *Glenshaw Glass* applied a statutory definition of "income" that exceeded the constitutional power of Congress, thereby unconstitutionally subjecting the taxpayer in that case to taxation. Indeed, the Court specifically recognized that Congress intended "to exert in this field 'the full measure of its taxing power' " (348 U.S. at 429 (quoting *Helvering* v. *Clifford*, 309 U.S. at 334)), thereby recognizing that the statutory and constitutional definitions are identical. Thus, petitioner's contention that the payments here are not "income" that can constitutionally be taxed must fail.[5]

2. Petitioners contend (87-1130 Pet. 8-16; 87-1244 Pet. 11-12) that the Alaska dividends are excludable as "gift[s]"

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[5] Petitioner erroneously contends (87-1244 Pet. 8) that *Simmons* v. *United States*, 308 F.2d 160, 167-168 (4th Cir. 1962), conflicts with the decision below because it recognizes the *Glenshaw Glass* definition as an interpretation of the Sixteenth Amendment. Clearly, *Simmons* creates no conflict with the decision below. By petitioner's own admission (87-1244 Pet. 6), the payments involved here would be income if the *Simmons* definition were applied. And the court below found that the payments were income. The fact that the court below did not find it necessary to invoke *Glenshaw Glass* to reach the same result that the Fourth Circuit concededly would have reached on these facts does not create a conflict in the circuits. Nor do the commentators cited by petitioner (87-1244 Pet. 6-7) support his position in any way. They merely express the view that the *Glenshaw Glass* opinion did not clearly indicate which of the two theories set forth above provided the basis for the Court's conclusion that the punitive damages there could constitutionally be taxed as income. Either of these rationales would similarly require rejection of petitioner's contention that the Constitution does not permit taxation of the type of income involved here.

under Section 102 of the Code. The criteria for determining whether a specific transfer of property is a "gift" or instead results in income to the recipient were delineated in *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), where the Court explained that the "critical consideration" in this inquiry is the transferor's " 'intention with which payment, however voluntary, has been made' " (*id.* at 285-286 (citation and footnote omitted)). The Court framed the inquiry into the transferor's intention as follows (*id.* at 285 (citations and footnote omitted)): "[I]f the payment proceeds primarily from 'the constraining force of any moral or legal duty,' or from 'the incentive of anticipated benefit' of an economic nature, * * * it is not a gift. * * * A gift in the statutory sense * * * proceeds from a 'detached and disinterested generosity,' * * * 'out of affection, respect, admiration, charity or like impulses.' " Both courts below correctly concluded that the payments involved here clearly were not gifts under the analysis set forth in *Duberstein*.

As the courts below found (Pet. App. 9-10, 30-31), the preamble to the Alaska statute demonstrates that the Alaska legislature considered it to be its "duty" (Pet. App. 40) to remit dividends to Alaska residents from the income derived from the State's mineral resources. Since the motivation for the payments proceeded from a perceived " 'moral or legal duty,' * * * it is not a gift" (*Duberstein*, 363 U.S. at 285 (citation omitted)). In addition, the Alaska legislature clearly contemplated that the State would derive benefits from the dividend program when it was enacted. Among the purposes stated in the Act were "to encourage persons to maintain their residence in Alaska and to reduce population turnover" and "to encourage increased awareness and involvement by the residents of the state in the management" of the Permanent Fund (Pet. App. 41). Indeed, it was these elements of the program that impelled the Supreme Court of Alaska to uphold the

program as consistent with the Alaska Constitution's requirement that any appropriation of public money be made for a "public purpose." See *Williams* v. *Zobel*, 619 P.2d 448, 460-464 (1980). These perceived and anticipated benefits to the State also negate treatment of the dividend payments as gifts.[6]

Petitioners argue (87-1130 Pet. 7, 10-13) that the *Duberstein* test should not have been applied, and the court of appeals instead should have inquired whether the payment could appropriately be characterized as part of a "quid pro quo" arrangement. Petitioners further maintain that the benefits to the State listed in the statute's statement of purposes are not sufficiently "substantial" to make the dividend payment part of a quid pro quo arrangement. This argument is flawed. Even if a "quid pro quo" analysis were substituted for the well-recognized *Duberstein* analysis, that would not assist petitioners. Their opinion of the substantiality of the benefits identified by the State is irrelevant. The Alaska legislature concluded when it enacted the dividend program that the State would receive benefits in return for making the payments, and its expectation of those benefits is a sufficient "quid pro quo" to preclude the tax treatment of the dividend payments as "gifts" under either analysis.[7]

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[6] Petitioners assert (87-1130 Pet. 9) that these stated purposes are outweighed by the other purpose listed in the statute—the intent to "provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth" (Pet. App. 40-41). But there is no basis for concluding that this was the "dominant reason" (87-1130 Pet. 9) and therefore no basis for ignoring the other stated purposes, which manifestly preclude gift treatment.

[7] Moreover, Section 542 of the Highway Revenue Act of 1982, Pub. L. No. 97-424, Tit. V, 96 Stat. 2195, reflects the apparent understanding of Congress that these dividend payments are taxable. That statute, which was proposed by Senator Murkowski of Alaska, was

3. Petitioners contend (87-1130 Pet. 16-17; 87-1244 Pet. 11-12) that the district court should not have decided this case at the summary judgment stage because the question of "donative intent" under *Duberstein* is a factual one that should have been submitted to a factfinder. As both courts below correctly concluded (Pet. App. 5-6, 25-28), however, the question of the intent of the legislature in enacting a statute is a legal one, to be resolved, as in any case involving statutory interpretation, by reference to the text of the statute and its legislative history. See *Heard* v. *Commissioner*, 326 F.2d 962, 965-966 (8th Cir.), cert. denied, 377 U.S. 978 (1964). Accordingly, as petitioners' own motions for summary judgment necessarily recognized, there were no factual issues in this case requiring a trial, and the district court therefore properly decided the case at the summary judgment stage.

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designed to relieve some recipients of the Alaska dividend from the necessity of filing an income tax return when they owed no tax because of the $1,000 personal exemption provided by Section 151 of the Code. It excuses from filing "an individual whose only gross income for the taxable year is a grant of $1,000 received from a State which made such grants generally to residents of such State." The text of the statute itself characterizes such payments as "gross income" and therefore belies the contention that they are excludable from gross income under Section 102 of the Code.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
ERNEST J. BROWN
RAYMOND W. HEPPER
Attorneys

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